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RECORD OF ORAL HEARING
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3   UNITED STATES PATENT AND TRADEMARK OFFICE
4   _____
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6   BEFORE THE BOARD OF PATENT APPEALS
7   AND INTERFERENCES
8   _____
9
10   Ex parte ATHANASSIOS TZIKAS, HANS REICHERT,
11   and HERBERT KLIER
12   _____
13
14   Appeal 2009-000421
15   Application 09/888,439
16   Technology Center 3600
17   _____
18
19   Oral Hearing Held: July 8, 2009
20   _____
21
22
23   Before MURRIEL E. CRAWFORD, HUBERT C. LORIN and ANTON W.

24   FETTING, Administrative Patent Judges

25
26   ON BEHALF OF THE APPELLANT:
27
28   WILLIAM ELLIS, ESQUIRE
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34

35   The above-entitled matter came on for hearing on July 8, 2009, at the U.S.

36   Patent and Trademark Office, 600 Dulany Street, Alexandria, Virginia,

37   before Dominico Quattrociocchi, Free State Reporting, Inc.

1   P R O C E E D I N G S

2

3   MS. COOK: Good morning. Calendar No. 14, Appeal No. 2009-

4 000421, Mr. William Ellis, Attorney for Appellant.

5   JUDGE CRAWFORD: Good morning.

6   MR. ELLIS: Good morning.

7   MR. LANDESMANN: Good morning.

8   MR. ELLIS: Mr. Landesmann is going to actually be doing the

9 argument. He's the inventor, and I'm just accompanying him. We were

10 hoping there was going to be a white board. I guess -- to draw, but I guess

11 not.

12   MR. LANDESMANN: Oh, that's fine.

13   JUDGE LORIN: Yeah, there's one behind the screen.

14   JUDGE CRAWFORD: Do you think so?

15   MR. LANDESMANN: Is there something behind there?

16   JUDGE LORIN: Yeah.

17   MR. LANDESMANN: It looks like it, yeah.

18   UNIDENTIFIED SPEAKER: There's an automatic button, maybe, up

19 on the -- to make it go up. Power.

20   JUDGE LORIN: That can't be pulled.

21   UNIDENTIFIED SPEAKER: Do you have a dashboard control,

22 maybe? I'll ask at the Clerk's Desk.

23   JUDGE CRAWFORD: Yeah, why don't you call Eleanor back in and

24 see if she knows how to --

25   MR. ELLIS: Thank you.

26   MR. LANDESMANN: So, should I start?

1   MR. ELLIS: Yeah, go.

2   JUDGE CRAWFORD: Start whenever you're ready.

3   MR. LANDESMANN: Okay. Great. Thank you. Well, thanks very

4   much for hearing this appeal. And also, I wanted to thank Examiner Lee for

5   her review of this case.

6   Essentially, the invention, the heart of the invention is the way that

7   critical -- how critical information that's generated in our economy is being

8   used, and that information is transaction information between buyers and

9   sellers. And you have a buyer, consumers and sellers, who are generally

10   merchants, and they generate a transaction record. And that transaction

11   record is very, very valuable information, especially for competitors of the

12   seller, who would love to acquire the business of the most valuable buyers,

13   by knowing what their purchases are.

14   And in the prior art, the way sellers acquired this information,

15   competing sellers, is essentially that the transaction record, all the

16   information generated in this transaction can only come either from the

17   buyer or from the seller, because those are the only two parties that are

18   entitled to have that information originally. So it call comes from them or

19   from people -- agents that are entitled by them. And so, that information

20   comes from the seller, they provide the transaction record information to an

21   ad system of some kind, which I've described in the background of the

22   specification.

23   And then you have advertisers who essentially use this -- these are

24   advertisers here, they're using the ad system, and they use this information to

25   then provide an ad to the buyer, to the consumer. But clearly, if the

26   advertisers have to get this critical information from their direct competitors,

1   if they have to go to their direct competitor to ask, "Can you give me the

2   information that will allow me to approach your customers," that's not --

3   they will generally not get the information for the purpose of directly

4   competing with the merchants. And to the extent that they get information,

5   it will be very costly and they would have to compensate their competitor

6   accordingly.

7   So, what my proposed present invention does is that it essentially

8   allows the buyer entity to directly submit his own purchase records to the

9   system, and therefore, these transaction records are then no longer -- no

10 longer come with all the restrictions, with all the problems attached that

11 comes with having to get this information from the competitors that you're

12 competing against. And then in return, what the advertisers and the system

13 do is to provide incentive offers -- well, that's not very legible -- back to the

14 buyer entity. And so, what the essential ingredients are is that you get actual

15 purchase record information from the buyer entity. Because you can't just

16 ask the buyer entity, "Well, what did you buy," because everybody, of

17 course, then would say that they are buying a lot of products and services

18 that are relevant in order to get these very attractive offers.

19   So you need a verifiable purchase record that has been issued by a

20 third party. It has to come from the buyer entity in order not to come with

21 all the restrictions and problems associated with sourcing from the seller.

22 And then in return, what you need to give the buyer entity for the system to

23 work is a preferential incentive offer, a discriminatory preferential incentive

24 offer, where you discriminate based on this information and you give the

25 buyer entity, the consumers, offers to which they would not have access

26 otherwise.

1   So, essentially, if you're a consumer using the system, you provide

2   your own information to the system and you identify yourself as a very

3   valuable prospect to the merchants who sell the products and services that

4   you buy the most and, in return, you get preferential offers that these

5   merchants would not be able to give out to everybody, because then all kinds

6   of opportunity seekers would come in who don't really buy this product on a

7   regular basis, but they only would be willing to offer it to you. So that a

8   high-end French restaurant would be willing to give you, you know, some

9   kind of a special incentive offer or promotion that they would only be

10   willing to give to somebody who frequently comes back to these types of

11   restaurants as opposed to someone who would go out and then use our

12   incentive offers and not really be one of the few very valuable prospects and

13   customers that these merchants have. And most of the business of these

14   merchants comes from those very high-value customers. In general, 15 to

15   20 percent of consumers account for 75 to 90 percent of revenues.

16   And so, if you look at the claim language, how this is reflected in the

17   claim language -- and I will direct you to Claim 207 -- what you have in step

18   one, the data that's being received from a plurality of buyers. It doesn't come

19   from the seller, it comes from the buyer, him or herself, and it comes in the

20   form of a third party purchase record issued by someone else, by another

21   buyer, by this buyer in the regular course of -- this seller in the regular

22   course of business, and it's a verifiable purchase record. And then you have

23   -- of an actual transaction. And then you have, in return, discriminatory

24   incentives that's based on this data that basically allows the advertiser to give

25   an incentive based on data that comes from outside the system, not

26   something that's been generated through prior transactions by the system

5

1   itself, but basically treat different people differently based on what their

2   activity has been outside and prior or separate from the use of the system,

3   what economists call discriminatory incentives.

4   And now, if you look at these elements and you have -- going back to

5   the claim language, then, in the third step -- a decision about an incentive

6   that's given based on this data. And it is an incentive. It's not -- you can't

7   pay for the information, you can only make that information actionable. So

8   it's an incentive offering at least one benefit in exchange for action. And

9   you have the condition precedent for the operation of the software system

10 that this data has been received. In other words, the buyer entity, in the

11 normal course of business, would not get this data, would not get this offer if

12 not or but for this data that has been provided by the buyer entity.

13   Now, going to the Goldhaber reference, the two excerpts that have

14 been cited to show that -- in support of the contention that Goldhaber

15 discloses buyers who made the third party purchase records is, on Column 6

16 of the Goldhaber reference, you have Lines 50 to 65, and I think what you

17 have here is a general description of how transactions within the system are

18 being stored in consumer profiles, and how there's electronic tracking of

19 his/her, meaning the consumer's, usage of the service, the goal of the system.

20 So, it explicitly refers to tracking of the service itself, in parentheses, and

21 other habits, sort of a generic parenthetic reference, and then the user has the

22 option to delete these transactions that they have generated by using the

23 system, as is very explicitly described here, not to add transactions coming

24 from outside the system.

25   And similarly, the second reference, in Column 7, you have the

26 sentence "The ads will be preselected for her, the consumer using the

6

1   system, on the basis of a personal profile, a questionnaire that she has

2   completed, plus automatic tracking of her previous Internet usage." So,

3   what you have is the questionnaire asking the consumer questions about

4   their habits, which is very unreliable to begin with, but, of course, will

5   become even more unreliable if you would give the consumer preferential

6   incentives based on these answers, exclusive incentives not otherwise

7   accessible.

8   And then you have the Internet usage, which is Internet browsing

9   habits, as has been, in the past, at the time of the Goldhaber reference, and

10   also time of the present invention, that's what tracking of Internet usage was

11   and is to this day, which is essentially cookies to track and record Web site

12   visits, which historically do not correlate very well with purchase. So, you

13   do not have buyer entities submitting third party purchase records in

14   Goldhaber. Neither of these two excerpts actually disclose -- make this

15   particular disclosure.

16   Weinblatt, the Weinblatt reference does disclose consumers

17   submitting purchase records, but they submit purchase records that they -- to

18   the store of purchase that they've made with a particular store. In other

19   words, a store gives them specialized receipts where -- that they particularly,

20   you know, retrofit, or there's a magnetic band that's been attached to these

21   receipts. They give these receipts to the consumer, the consumer goes back

22   home and uses, again, a very specialized unit, which is referred to as home

23   unit No. 41, and then inputs these receipts into this particular machine in

24   order to record the store's own transactions. For which purpose? For the

25   purpose of measuring the effectiveness of advertisements to which the

26   consumer has previously been exposed to.

1   So it's an entirely different context. It's a different problem that's

2   being solved. And these purchase records are not third party purchase

3   records. And as a matter of fact, as the system is described in Weinblatt,

4   you could not even use it in this particular invention because it is something

5   that third party purchase records could not be fed into this particular

6   machine.

7   The Weinblatt also discloses, in general, bar code reading; consumers

8   inputting their purchase records with bar codes and with in-store cards,

9   supermarket cards, both of which are disclosed in the background section of

10   Weinblatt, but which Weinblatt himself says are not reliable sources or

11   suspect, as he calls them, sources of purchase data. And in fact, they're not,

12   of course, third-party-issued purchase records that solve the problem of

13   actually creating verifiability; making sure that the information that the

14   consumer submits in his favor is accurate.

15   Now, preferential discriminatory incentives are neither -- as is

16   admitted by the rejection -- neither disclosed in Goldhaber -- well, it's not

17   disclosed in Goldhaber. And also, Weinblatt discloses rewards given for

18   consumers -- to consumers for cooperating with the system, for providing

19   the information about their same store purchase habits.

20   But the Office Action relies on Day for disclosure of discriminatory

21   preferential incentives, and these discriminatory preferential incentives are

22   not disclosed either in Goldhaber or in Weinblatt. And in Day, what you

23   have is you have incentives that are given to some consumers based on their

24   in-store purchase habits with the same store. But that, again, does not

25   accomplish the same purpose that the submission of third party purchase

26   records would accomplish, which is to be able to get this information from

1   the consumer without requiring the cooperation of the seller that initially

2   sold the products.

3   So in Day, yes, you could give -- and it is disclosed in Day, at least

4   alluded to, that you could give a better incentive to a Coca-Cola customer:

5   giving specialized Pepsi Cola coupons to a Coca-Cola customer in a Day

6   supermarket. But the problem is that you then have to rely on Coca-Cola to

7   keep supplying the supermarket in order to be able to poach Coca-Cola's

8   customer in favor of Pepsi Cola. And to the extent that Coca-Cola would

9   allow that, of course it would come with a cost attached, and Coca-Cola

10   would have to rethink it's relationship with that supermarket if that

11   supermarket chain consistently poaches his customers in favor of Pepsi Cola.

12   So you do not have third-party-submitted preferential incentives that

13   discriminate based on data that's generated outside the store, outside the

14   supermarket in Day.

15   And so, neither of these two elements of the invention, the third party

16   submission of third party purchase records, as well as preferential incentives,

17   discriminatory preferential incentives based on outside non-system use,

18   neither of these two elements are disclosed in either of these three

19   references.

20   Now, even if these three references were not deficient and would not

21   have these deficiencies and all these elements of Claim 207 would be

22   disclosed -- and I forgot to indicate earlier that Claims 214 and 222 also

23   further strengthen and give -- add more detail to the definition of preferential

24   incentives.

25   But even if all these things were disclosed by the three references –

26   one would not think about combining these particular references because

1   they are -- they so address entirely fundamentally different problems. They

2   have different objectives. Goldhaber wants to change the relationship

3   between consumers and advertisers by compensating consumers: instead of

4   showing ads that are linked to content, paying them directly to view ads.

5   Weinblatt wants to measure the effectiveness of advertisements that have

6   already been shown to consumers, not to increase their effectiveness. And

7   Day wants to up-sell consumers based on in-store purchases. These are

8   entirely different environments. The background sections of these three

9   inventions, actually, they go completely past each other. They're different

10   mindsets, different backgrounds, and they solve different problems and they

11   could not be combined.

12   Even if one would try to combine these references as they are written,

13   certainly the idea of going to a supermarket and starting to submit third party

14   purchase records in some way, you know, would be, you know, strange and

15   weird and counterintuitive. That's not something that one would think of

16   doing. Applying preferential rewards to Weinblatt would exacerbate the

17   problem of -- the very problem that Weinblatt is trying to address, which is

18   the lack of reliability of what the consumer says about his purchase habits.

19   And applying preferential -- differential, any kind of differential rewards,

20   Goldhaber has no differential rewards.   Applying any kind of differential

21   rewards to Goldhaber, again, would create a problem; that Goldhaber relies

22   mostly on questionnaire data, and the consumer would then have an

23   incentive to cheat and to basically provide misleading information about his

24   or her purchase habits.

25   And so, you have three references that address, really, different

26   backgrounds, different worlds, different problems, and that could not be,

1   even if one wanted to, could not be, in a way that would make sense and that

2   would work, combined. Not to speak of the fact that they are deficient as

3   I've shown in the two most important respects of the invention, as I hope that

4   I've shown previously.

5   Now, this invention is supported by five affidavits, which have been

6   provided by experts in the field. James Bohannon, Chaz Berman were both

7   senior executives of the company that actually implemented the Goldhaber

8   invention.

9   JUDGE FETTING: Excuse me. When were those affidavits

10 submitted?

11   MR. LANDESMANN: They were submitted in response to the first

12 Office Action, so that must have been at least six years ago.

13   JUDGE FETTING: It looked like they were in 2003. It appeared that

14 the art that's currently being applied was not in front of the people

15 submitting those affidavits. Is that accurate?

16   MR. LANDESMANN: No, no, the Goldhaber reference was in front

17 of -- was definitely --

18   JUDGE FETTING: And which affidavit mentioned the Goldhaber?

19   MR. LANDESMANN: No, no, they don't mention it, but it was part

20 of the prior art of record, and they do refer to the prior art of record, if I'm

21 not mistaken.

22   JUDGE FETTING: Okay. So none of them specifically referred to

23 the Goldhaber reference?

24   MR. LANDESMANN: At that time, there was a reference, a

25 combination of Golden with others --

1   JUDGE FETTING: Okay. So Goldhaber was not actually applied to
2 the rejection at the time that the affidavits were supplied?
3   MR. LANDESMANN: Exactly.
4   JUDGE FETTING: Okay.
5   MR. LANDESMANN: We supplied Goldhaber. It was the very first
6 reference that we indicated as the main reference, which subsequently, then,
7 has been referred to as the main reference.
8   JUDGE FETTING: Okay.
9   MR. LANDESMANN: But Goldhaber is -- I mean, two of the
10 affiants have worked -- one has been part of the senior management team of
11 Cyber Gold, which is actually assignee and the implementer of the
12 Goldhaber reference mentioned. The other is the chief operating officer of
13 the company that acquired Cyber Gold -- was the chief operating officer at
14 the time of the Cyber Gold acquisition. So they are both certainly very well
15 familiar, both with the patent itself, having -- worked in a senior
16 management position for the company. And certainly, Professors Deighton
17 and Noll (phonetic sp.) from Harvard Business School, and Seth Godin
18 himself, who responded to the rejection using his own prior art -- which is an
19 extraordinarily generous step of him to actually step forward and to say,
20 well, the Examiner is quoting me, is relying on me to reject this patent and
21 guess? I do not think this patent is obvious at all, I think it's not obvious;
22 something that Seth Godin agreed to do without any compensation paid to
23 him.
24   JUDGE FETTING: We're almost out of time. I just want to back up
25 to the Goldhaber reference because you seem to imply that the Goldhaber
26 reference is not providing purchase transactions, and yet the Column 6 that

12

1   you referred to does in fact speak to populating the consumer profile with

2   purchasing transactions. So the consumer profile appears to contain

3   purchase records. And the Examiner's argument, near as I can tell, is since

4   these records are within Goldhaber's system, whoever owns Goldhaber's

5   system is a third party, therefore they are third party purchase records.

6   MR. LANDESMANN: Who owns the third -- no, third party is

7   defined as receiving something from the buyer entity. The system receives

8   purchase records. There is no receipt of purchase records in Goldhaber.

9   These are records, transaction records that have been explicitly generated by

10 the system itself. He very specifically talks throughout the reference about

11 evolving with -- the profiles can be dynamic, evolving with the customer's

12 transaction history. A customer can choose to exclude any transaction from

13 his profile. These are transactions --

14   JUDGE FETTING: They can delete them, yes, but, but --

15   MR. LANDESMANN: They can delete them. These are transactions

16 that are captured by use of the system.

17   JUDGE FETTING: Right.

18   MR. LANDESMANN: So the third party is -- so it's something that's

19 generated by the system. The consumer is not submitting the purchase

20 records. The buyer entity is not submitting the purchase records.

21   JUDGE FETTING: The buyer entity enters a transaction. That

22 transaction will generate a computer record.

23   MR. LANDESMANN: Sure.

24   JUDGE FETTING: So, therefore, that computer record is coming

25 from the consumer having created it.

26   MR. LANDESMANN: Well, well --

1   MR. ELLIS: Third party is really defined in the application as

2 coming from outside the system.

3   JUDGE FETTING: Where is that definition?

4   MR. ELLIS: I'd have to go back and look in the application.

5   MR. LANDESMANN: There's quite a long section about the

6 different ways in which consumers submit purchase records, and it's --

7   JUDGE FETTING: I did not see such a definition.

8   MR. LANDESMANN: Well, it's not explicitly defined as "the third

9 party's defined as," but the specification very clearly speaks of consumers

10 submitting their purchase records, and there are four or five different ways in

11 which they submit these purchase records that is very specifically described.

12 All of these ways --

13   JUDGE FETTING: Those are examples, though. Those are not

14 meant to be limiting.

15   MR. LANDESMANN: Those are -- well, it's not -- if you use a

16 system and you generate a transaction, or you go to Bloomingdale's and you

17 buy something at Bloomingdale's, that's not submitting a purchase record.

18 You're not submitting a purchase record to Bloomingdale's, you're buying

19 something. In Goldhaber, you use the system, you buy something, you view

20 an ad. That is not submitting a purchase record.

21   JUDGE FETTING: But you're not using Goldhaber to purchase

22 something. Goldhaber is sitting on top of whatever is actually creating the

23 transactions. Goldhaber is just capturing the transactions to populate its

24 consumer profile. That's the Examiner's point, is that there's multiple

25 systems here. The system that the actual transaction occurs in is separate

26 from Goldhaber.

14

1   MR. LANDESMANN: No. Well, I mean --

2   MR. ELLIS: The quotation actually says "usage of the service." So

3   usage of the Goldhaber service creates the transaction record.

4   JUDGE FETTING: No, it captures the transaction record, it does not

5   create the transaction record.

6   MR. ELLIS: Well, it says usage of the service. It doesn't say -- talk

7   about -- it doesn't use the word creation, but it says usage of the service, and

8   then that populates the profile.

9   JUDGE FETTING: Right, that populates the profile, but that does not

10 create the sales transaction. That simply creates the profile record, which is

11 indicative of the sales transaction. Because the sale transaction is occurring

12 between the customer and the merchant. Goldhaber says nothing about

13 getting involved in the actual transaction itself, it's just capturing evidence of

14 the transaction.

15   MR. LANDESMANN: No, no, that's not true. In Goldhaber, these

16 transactions, Goldhaber doesn't visit something that's happening exogenous

17 to the system and captures it. Goldhaber provides a system itself that allow

18 a forum for advertisers to come and advertise their wares.

19   JUDGE FETTING: Right.

20   MR. LANDESMANN: And so, this is not a capturing technology, it's

21 a -- the Goldhaber solution and technology is about a meeting place very

22 explicitly for consumers with advertisers. So the fundamental problem that

23 you would require -- to go back to the Pepsi Co. versus Coca-Cola example,

24 you would need Pepsi Cola to actually advertise on the Goldhaber system in

25 order to allow Coca-Cola to target those consumers that have looked at Pepsi

26 Co. ads. That problem is not solved by Goldhaber. These are not third party

15

1   purchase records that are being submitted. A third party can only mean -- a

2   third party means if you have a consumer interacting with a system. The

3   consumer's one party, the system is the second party. It's not a --

4   JUDGE FETTING: Well, see --

5   MR. LANDESMANN: So the third party cannot be the system. I

6   mean, that's --

7   JUDGE FETTING: There's no definition of a third party I've been

8   able to see. Now, when we say third party in the context of a sale, you have

9   a consumer and a merchant, and anybody else is a third party. So

10   Goldhaber's system is a third party. It's not the merchant, and it's not the

11   consumer.

12   MR. LANDESMANN: Well, this is, I mean, this is a semantic issue.

13   I mean, for me, third party --

14   JUDGE FETTING: Yes, this is claim construction. And that's the

15   way the Examiner apparently has construed the term third party. And I

16   haven't seen anything to dispute that.

17   JUDGE LORIN: No, I agree. This is an important question. I would

18   like the counsel to go to the podium, please, so we can speak to you. You're

19   the one who's drafted his application and the claims. Can you speak to us

20   what you mean by third party in the claim?

21   MR. ELLIS: The intent is something coming from outside the

22   system. The claimed system, the claimed operation is bringing in third party

23   receipts from a consumer or from some entity that he's designated to send in

24   these third party receipts, accumulating these and then creating and offering

25   preferential incentives, but only with a software-implemented condition

26   precedent that these receipts have been received, in fact, from the third party

1   -- from the consumer. And in fact, that's something that's missing from all

2   of the references, is there's no software-implemented condition precedent

3   which prevents this offering from occurring but for the receipt of these

4   records from the buyer entity.

5   JUDGE LORIN: Now, tell us, based on the specification, who is the

6   first party and who is the second party to which you're distinguishing your

7   third party?

8   MR. ELLIS: The first party is going to be the system.

9   What is the second party?

10   MR. LANDESMANN: Well, third party is meant generically as an

11   outside party. I mean, it doesn't mean there's going to be -- the two parties,

12   the first two parties could be the system, the buyer and the advertiser --

13   JUDGE LORIN: I'm not really interested in speculation. We have

14   claims here. We're going to construe these claims in view of the

15   specification, in light of one of ordinary skill.

16   Speaking to you, when we construe this claim, how should we

17   understand this?

18   MR. ELLIS: That the system is handling the sale.

19   JUDGE LORIN: The system's handling the sale?

20   MR. ELLIS: Yes.

21   JUDGE LORIN: That's the third party?

22   MR. ELLIS: No, no, the system is the first party. The system is

23   performing the sale transaction.

24   JUDGE LORIN: So you're --

25   MR. ELLIS: It's going through the system.

26   JUDGE LORIN: It's going through the system.

1   MR. ELLIS: In other words, you're not getting it after the fact.

2   JUDGE FETTING: Wait a minute. What sale is occurring in the

3 claim?

4   MR. ELLIS: In the claim, you're just receiving sales that have

5 occurred, after the fact. You're receiving third party purchase records from

6 the buyer entity after the fact, after it's occurred.

7   JUDGE FETTING: Right. So, who are the first and second parties in

8 the sales transactions? That's what we're talking about. We're trying to

9 construe this claim.

10   MR. ELLIS: I think the key point here is that the system is not the

11 third party. These purchase records are not coming in through the system.

12 They're being received --

13   JUDGE FETTING: Okay. Who is the first and second party?

14   MR. LANDESMANN: The first and second party have not been

15 defined. The third party has been defined as the seller, but not -- I think that

16 clearly comes across from reading the specification, that the third party in

17 the third party purchase record is the original seller of the transaction that

18 does not participate in the system. The seller in the transaction record. We

19 have never defined first party, second party explicitly, and maybe we should

20 have. But I think it's clear that the third party is neither the advertiser nor

21 the system nor the consumer.

22   JUDGE LORIN: You know, this is the reason why I'm speaking to

23 the attorney. We understand what you believe the invention is.

24   MR. LANDESMANN: Sure.

1   JUDGE LORIN: I'm not trying to be dismissive of you, but this is a

2 claim construction question which is a legal question, which is something

3 that we need to look at and understand what is being said in the claim.

4   MR. LANDESMANN: Right. No, I understand.

5   JUDGE LORIN: Whether that comports with your understanding of

6 how you think the invention is, is a different matter.

7   But I want to know from the attorney, since the attorney's prosecuting

8 this case before us, what your view is of the third party. That seems to be a

9 critical limitation that you're arguing distinguishes your invention, as

10 claimed, over that of the prior art.

11   MR. ELLIS: A third party --

12   JUDGE LORIN: We need to know what that third party is in order to

13 understand why you're saying that that is a distinction.

14   MR. ELLIS: The third party is the seller. The system is not the seller.

15   JUDGE LORIN: The third party is the seller?

16   MR. ELLIS: Correct.

17   JUDGE CRAWFORD: Now, is that in your specification?

18   MR. LANDESMANN: In a transaction record.

19   JUDGE CRAWFORD: Is that defined in your specification as such?

20   MR. ELLIS: I think the third party purchase record is defined in the

21 specification, in other words, as a combination of words: third party

22 purchase record.

23   JUDGE LORIN: Can you point us to the specification where you've

24 made any sort of discussion of what you mean to say by third party?

25   MR. ELLIS: Not right now.

26   Mark, do you have --

1   MR. LANDESMANN: If I have -- I don't have actually a copy in

2   front of me, but I could find it relatively quickly. But again, it would be

3   examples.

4   MR. ELLIS: Is it possible to submit a one-page supplement just

5   answering that question?

6   JUDGE LORIN: Well, we won't come to that decision now. I mean,

7   we'll look at the case in light of what you've said here at the hearing and

8   proceed from there. But, you know, these hearings are to enlighten us into

9   your position. We understand that an important factor in establishing your

10   invention is this concept of the third party. I mean, I personally am

11   struggling with what you mean by third party. You began the discussion by

12   distinguishing over the prior art between buyer/seller, and yet I'm not really

13   sure why the third party couldn't be the seller.

14   MR. ELLIS: The third party is the seller. And this record is not

15   coming in from the seller, the record is a seller-created purchase record that

16   is coming in from the buyer entity. And there's a software-implemented

17   condition precedent that this offering is not going to happen unless he has

18   sent in some form of third party purchase record.

19   MR. LANDESMANN: May I say something that --

20   JUDGE CRAWFORD: We're running a little short of time, so --

21   MR. LANDESMANN: Okay. The advertiser -- it's an interaction

22   between the buyer entity and the advertiser, and the seller is the selling

23   entity on the purchase record. It's the entity that sold the product that is on

24   the purchase record.

25   JUDGE CRAWFORD: Judge Fetting, do you have further questions?

26   JUDGE FETTING: No.

20

1   JUDGE CRAWFORD: Thank you.

2   MR. ELLIS: Okay. I might just conclude by saying that these claims

3   were written four years ago, before the most recent Federal Circuit case on

4   software, and this is actually a software-implemented method by computer.

5   And, you know, on remand, we can always add computer, the word

6   computer. We thank you very much.

7   (Whereupon, the hearing concluded at 10:04 a.m., on July 8, 2009.)